BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–756 OF 2007

SURIYADI, ZAINUN ALI AND SULAIMAN DAUD JJCA

20 MAY 2009

Civil Procedure — Appearance — Unconditional appearance — Effect of — Whether defendant precluded from filing application to strike out

Contract — Indemnity — Creation, right of — Right of indemnity to be founded on express or implied contract or implied indemnity arising from relationship between parties — Whether cause of action giving rise to right of indemnity to be pleaded

Contract — Indemnity — Limitation period — Right of indemnity claimed as a consequence of breach of contract or breach of duty of care — Whether claim time-barred — Limitation Act 1953 s 6

Limitation — Contract — Indemnity — Right of indemnity claimed as a consequence of breach of contract or breach of duty of care — Whether claim time-barred — Limitation Act 1953 s 6

In 1979 the respondent/plaintiff entered into a memorandum of understanding ('MOU') with the appellant/defendant for the development and operation of a proprietary club in Malaysia ('the club'). Pursuant to the terms of the MOU, a company called Raintree Development Sdn Bhd ('RDB') was acquired in 1979. In May 1980 another company called Allied Capital Sdn Bhd ('Allied') was incorporated. A share acquisition agreement was concluded between the club and Allied. Subsequently the members of the club, by way of Kuala Lumpur High Court Suit No C22–204 of 1986, commenced a representative action against the respondent and office bearers of the club for damages for breach of fiduciary duties and the duty of care under the MOU in connection with the share acquisition agreement. The High Court allowed the claim and ordered damages to be assessed. The respondent then commenced the present action against the appellant alleging that it had breached its undertaking and representation under the MOU or

alternatively its duty of care pursuant thereto. The respondent claimed an order that the appellant fully indemnified the respondent for such sum which the respondent was liable to pay under Suit No C22–204 of 1986. The appellant applied to strike out the writ and statement of claim pursuant to O 18 r 19(1)(b) or (c) of the Rules of the High Court 1980 ('RHC') on the ground that the statement of claim had set up causes of action which were barred by the Limitation Act 1953. The striking out application was allowed by the senior assistant registrar. The learned judge allowed the respondent's appeal and hence this appeal by the appellant.

Held, allowing the appeal with costs:

(1) There are many ways in which a right of indemnity may arise. As such, in order to maintain a claim for indemnity, the respondent not only has to plead that the appellant was in breach of its contractual duty or its duty of care to him but also the cause or causes of action for such an indemnity, ie whether founded on an express or implied contract, or on an implied indemnity arising from the relationship between the parties (see para 23).

(2) Neither an express or implied contract of indemnity, nor any other basis of indemnity, were pleaded as the basis for the respondent's claim for an indemnity. None of the elements were pleaded in the statement of claim to formulate or sustain a complete cause of action for an indemnity. Based on the pleadings, the respondent's claim was merely founded on a breach of contract and breach of duty of care in tort (see para 29).

(3) The plaintiff's case was that he had suffered damages in consequence of the defendant's breach of contract or alternatively breach of duty of care. The alleged breaches here related to the advice given by the appellant to the respondent with regard to the setting up of the club, and the valuation of RDB shares in the share acquisition agreement, both of which must have taken place at the latest before 1983 when the members refused to pay the balance of the purchase price of the share sale. The present action which was only filed on 20 August 2003 was therefore statute-barred pursuant to s 6 of the Act (see para 33).

(4) With regard to the filing of the unconditional appearance, the appellant, having filed such an appearance could not be taken to have abandoned its right to file the application under O 18 r 19 of the RHC. Neither the entry of an unconditional appearance, nor the serving of the statement of defence, precluded the appellant from making an application under the said rule (see para 34).

[Bahasa Malaysia summary

Pada 1979 responden/plaintif memasuki satu memorandum persefahaman ('MOU') dengan perayu/defendan untuk pembangunan dan operasi sebuah kelab milikan di Malaysia ('kelab'). Menurut terma-terma MOU, sebuah syarikat dikenali sebagai Raintree Development Sdn Bhd ('RDB') diperoleh pada 1979. Pada Mei 1980 sebuah lagi syarikat yang dikenali sebagai Allied Capital Sdn Bhd ('Allied') telah ditubuhkan. Satu perjanjian pemerolehan saham telah dilaksanakan antara kelab tersebut dan Allied. Kemudiannya ahli-ahli kelab tersebut, melalui guaman Mahkamah Tinggi Kuala Lumpur No C22–204 Tahun 1986, memulakan tindakan perwakilan terhadap responden dan pemegang jawatan kelab untuk ganti rugi bagi pelanggaran kewajipan fidusiari dan kewajipan berjaga-jaga di bawah MOU berkaitan dengan perjanjian pemerolehan saham. Mahkamah Tinggi membenarkan tuntutan tersebut dan mengarahkan agar ganti rugi tersebut dinilai. Responden kemudiannya memulakan tindakan ini terhadap perayu mendakwa bahawa dia telah memungkiri akujanji dan perwakilan bawah MOU atau secara alternatifnya kewajipannya untuk berjaga-jaga. Responden menuntut satu perintah bahawa perayu menanggung rugi responden sepenuhnya bagi jumlah yang responden bertanggungan untuk membayar di bawah Guaman No C22–204 Tahun 1986. Perayu memohon untuk membatalkan writ dan penyata tuntutan menurut A 18 k 19(1)(b) atau (c) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas dasar bahawa penyata tuntutan yang menetapkan kausa tindakan telah dihalang oleh Akta Had Masa 1953. Permohonan pembatalan tersebut telah dibenarkan oleh penolong kanan pendaftar. Hakim yang bijaksana membenarkan rayuan responden. Maka rayuan ini oleh perayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Terdapat banyak cara yang mana hak menanggung rugi boleh berbangkit. Oleh itu, bagi mengekalkan tuntutan untuk menanggung rugi, responden bukan sahaja perlu mengaku bahawa perayu melanggar kewajipan kontraktualnya atau kewajipannya untuk berjaga-jaga tetapi juga kausa atau kausa tindakan untuk menanggung rugi, sama ada berasaskan kontrak tersurat atau tersirat, atau pada penanggungan rugi tersirat yang timbul daripada hubungan antara pihak-pihak (lihat perenggan 23).

(2) Baik kontrak menanggung rugi tersurat atau tersirat, mahupun mana-mana dasar menanggung rugi yang lain, diplidkan sebagai dasar untuk tuntutan responden untuk menanggung rugi. Tidak satupun daripada elemen-elemen tersebut yang diplidkan dalam penyata tuntutan untuk merumuskan atau mengekalkan kausa tindakan untuk

menanggung rugi. Berdasarkan pliding tersebut, tuntutan responden hanya berdasarkan pelanggaran kontrak dan pelanggaran kewajipan berjaga-jaga dalam tort (lihat perenggan 29).

(3) Kes plaintif adalah di mana dia mengalami kerugian disebabkan pelanggaran kontrak oleh defendan atau secara alternatifnya pelanggaran kewajipan berjaga-jaga. Pelanggaran-pelanggaran yang dikatakan di sini berkaitan dengan nasihat yang diberikan oleh perayu kepada responden mengenai penubuhan kelab, dan penilaian saham-saham RDB dalam perjanjian pemerolehan saham, yang mana kedua-duanya berlaku sebelum 1983 apabila ahli-ahli tersebut enggan membayar baki harga belian jualan saham. Tindakan ini yang hanya difailkan pada 20 Ogos 2003 oleh itu dihalang oleh statut menurut s 6 Akta (lihat perenggan 33).

(4) Berkenaan memfailkan kehadiran tanpa syarat, perayu setelah memfailkan kehadiran tersebut tidak boleh dikatakan menggugurkan haknya untuk memfailkan permohonan di bawah A 18 k 19 KMT. Kemasukan kehadiran tanpa syarat, mahupun penyampaian penyata pembelaan, tidak boleh menghalang perayu daripada membuat tuntutan di bawah kaedah tersebut (lihat perenggan 34).]

Notes

For cases on indemnity, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2264.

For cases on indemnity generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4245–4257.

For cases on unconditional appearance, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1573–1582.

Cases referred to

Chan Min Swee v Melawangi Sdn Bhd [2000] 7 MLJ 111; [2000] 7 CLJ 1, HC (refd)

Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co (sued as a firm) & Ors [2001] 6 MLJ 532; [2001] 3 AMR 3529, HC (refd)

Fu Yen Development Sdn Bhd (suing as a firm) v Shelley Yap Leong & Co (sued as a firm) [2001] MLJU 313; [2001] 3 AMR 3736, HC (refd)

JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry & Ors and related appeals [1990] 2 AC 418, HL (refd)

Koh Siak Poo v Sayang Plantation Bhd [2002] 1 MLJ 65, CA (refd)

Malayan Banking Bhd v Basarudin Ahmad Khan [2007] 1 MLJ 613; [2007] 1 CLJ 309, FC (refd)

N Carrupaiya v MBf Property Services Sdn Bhd & Anor [2000] 4 MLJ 389, HC (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (folld)

Ong Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504, HC (folld)

R & H Green & Silley Weir Ltd v British Railways Board (Kavanaugh, third party) [1985] 1 All ER 237, Ch D (refd)

State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)

Telfair Shipping Corporation v Inersea Carriers SA [1985] 1 WLR 553, QBD (refd)

Legislation referred to

Limitation Act 1953 s 6

Rules of the High Court 1980 O 18 r 19, 19(1)(b), (c)

Appeal from: Civil Suit No S5–23–425 of 2003 (High Court, Kuala Lumpur)

Tommy Thomas (Ealing Yap and Tan Kai Sin with him) (Wong & Partners) for the appellant.

Jagdip Singh Mallan (Ringo Low & Associates) for the respondent.

Sulaiman Daud JCA:

[1] The respondent (plaintiff in the court below) is a well known and respected figure from the royal family of the State of Pahang. The appellant (defendant in the court below) is a company registered in Hong Kong and is and was at all material times a wholly owned subsidiary of the Bank of the Phillipine Islands.

[2] On 20 August 2003 the respondent issued the present writ against the appellant claiming, inter alia, for an order that the appellant fully indemnifies the respondent for such sum which the respondent is liable to pay to the members and/or Raintree Development Bhd under the Kuala Lumpur High Court Suit No C22–204 of 1986, and/or any other loss directly or indirectly related to it.

[3] By summons in chambers dated 15 November 2005, the appellant applied to strike out the said writ and statement of claim pursuant to O 18 r 19(1)(b) or (c) of the Rules of the High Court 1980 ('RHC') on the ground that the statement of claim had set up causes of action which were barred by the Limitation Act 1953 ('the Act').

[4] The striking out application was allowed by the senior assistant registrar ('SAR'). On appeal to the judge in chambers, the learned judge allowed the appeal and reversed the decision of the SAR. Hence the appellant's appeal to this court.

[5] After hearing submissions of counsel for both parties, we allowed the appeal with costs. We now give our reasons. A

BACKGROUND FACT

[6] The facts as set out in the statement of claim can be briefly stated as follows. In 1979 the respondent entered into a memorandum of understanding ('MOU') with the appellant for the development and operation of a proprietary club in Malaysia ('the club'). B

[7] Pursuant to the terms of the MOU, a company called Raintree Development Sdn Bhd ('RDB') was acquired in 1979. In May 1980 another company called Allied Capital Sdn Bhd ('Allied') was incorporated. Both RDB and Allied have common shareholders and directors which include the respondent. C D

[8] RDB owned the land on which the club premises were to be built. On 31 January 1981 Allied purchased the entire paid up shares of RDB, and on 9 May 1981 RDB appointed Allied as the contractor to build the club's premises. E

[9] Before that on 4 May 1981, the Board of Directors of RDB passed a resolution to alter its share structure by proposing to issue 1540 class A shares and 660 class B shares, both for RM10,000,000 each to be sold to the public. F

[10] On 21 October 1981 the respondent was elected as the president of the Protem Committee of the club. At its meeting on 3 June 1982, the committee resolved that the entire issued and paid up capital of RDB was to be purchased by the club from Allied for the sum of RM47m ('the share sale'). Thereafter on 24 August 1982 a share acquisition agreement was concluded between the club and Allied. G

[11] Subsequently the members of the club, by way of Kuala Lumpur High Court Suit No C22–204 of 1986, commenced a representative action against the respondent and office bearers of the club for damages for breach of fiduciary duties and the duty of care under the MOU in connection with the share acquisition agreement. The High Court allowed the claim and ordered damages to be assessed. The members also succeeded in their counterclaim against Allied vide Suit No C23–1084 of 1986 for the sum of RM16,571,734, being over payment in the share sale together with interest of RM556.752 (both the suits collectively referred to as 'the said suits'). H I

[12] The respondent then commenced the present action against the appellant alleging that it had breached its undertaking and representation under the MOU or alternatively its duty of care pursuant thereto.

[13] The appellant in its defence denied the alleged breach of contract or that it owed any duty of care to the respondent in the execution and performance of the MOU. Further the appellant pleaded that the claims herein were statue barred under the Act.

DECISION OF THE HIGH COURT

[14] The learned judge in allowing the respondent's appeal found that limitation has not set in as he is of the view that 'the plaintiff is claiming indemnity against the defendant in respect of two suits'. The learned judge relied on *R & H Green & Silley Weir Ltd v British Railways Board (Kavanaugh, third party)* [1985] 1 All ER 237, where it was held that:

> in the absence of a contractual term to the contrary, times run against a person seeking to enforce an indemnity from the date when he is called upon to pay, not from the date of the event giving rise to his liability to do so.

[15] The only issue that was considered by the learned High Court judge which was pursued in this appeal is that of limitation. In our view, for the determination of the said issue it will be necessary to firstly determine the nature of the respondent's claim herein, ie whether the claim is founded on breach of contract and negligence, or on an indemnity. Having determined the nature of the claim, the next question to be answered is at what point of time does time begins to run for the purpose of limitation under the Act.

NATURE OF CLAIM, WHETHER ON CONTRACT, ETC, OR ON INDEMNITY

[16] On behalf of the appellant, Mr Tommy Thomas submitted that it is apparent from the pleading that the respondent's claim herein is founded on breach of contract and tort and not on an indemnity. Learned counsel pointed out the material facts upon which the respondent based his claim are set out in paras 3–7 of the statement of claim. However, he argued, neither an express or implied contract of indemnity, or indeed any basis at all of indemnity, has been pleaded therein to support the claim for an indemnity.

[17] For the reasons aforesaid, it is his contention that the learned judge, in applying *R & H Green & Silley Weir Ltd v British Railway Board (Kavanaugh, third party)*, has failed to consider sufficiently that the present

claim is based on a right to damages for breach of contract and not on a straight forward contract of indemnity as in that case.

[18] Mr Jaqdip Singh, for the respondent, in seeking to uphold the judgment of the court below, submitted that unlike any breach of contract, the respondent's claim herein is premised on indemnity. It is his contention that the learned judge has rightly followed the principle laid down in *R & H Green & Silley Weir Ltd v British Railway Board (Kavanaugh, third party)*, in the computation of the limitation period.

[19] The differences between the right to damages and the right to indemnity was explained at length by Arifin Zakaria FCJ (as he then was) in *Malayan Banking Bhd v Basarudin Ahmad Khan* [2007] 1 MLJ 613; [2007] 1 CLJ 309, where he said at p 650 (MLJ); 319 (CLJ):

> ... The traditional view is that damages for breach of contract committed by the defendant are compensation to the claimant for the damage, loss or injury suffered through the breach. (See *Chitty on Contracts* Vol 1 (29th Ed) para 26–001.) This is the common law right arising from breach of contract and it is not the subject of the contract. In other words it need not be provided for in the contract (see the judgment of Fry LJ in *Birmingham and District Land Company v London and North Western Railway Company*). This right is contained in s 74(1) of the Contracts Act 1950 ...
>
> By contrast indemnity is a right which has to be provided for in the original bargain between the parties. It is a formal legal acceptance of responsibility for damage or loss. Indemnity springs from contract express or implied (see P Ramanatha Aiyur's *The Law Lexicon* (2nd Ed)). As stated earlier indemnity and damages as incidence for breach of contract or tortious act are not synonymous but distinct …

[20] Rights of indemnity may arise from contract, express or implied, from an obligation resulting from the relation of the parties or by statue. Whether in any particular case any right of indemnity arises, and the extent of any such indemnity, will depend upon the terms of the contract or statue in question, or the nature of the relationship (see *Halsbury's Laws of Malaysia* Vol 16, at paras 270.190 and 270.191).

[21] In *Telfair Shipping Corporation v Inersea Carriers SA* [1985] 1 WLR 553, Neill J, upon analysis of the authorities referred to therein, identified 'at least three ways in which a person A who has become liable to B may be able to obtain redress from C'. The first way is by an action for damages for breach of contract; the second way is by a claim of an express indemnity; and the third way is under an implied indemnity.

[22] On the right to an implied indemnity, in *JH Rayner (Mincing Lane) Ltd v Department of Trade And Industry & Ors and related appeals* [1990] 2 AC 418, Lord Oliver said at p 520:

> It is quite clear from the authorities which have been drawn to Your Lordship's attention as establishing or supporting the general principle of indemnity which the appellants rely that indemnity is not an automatic consequence of a request to do an act. Such a right of indemnity arises only where the circumstances justify the implication of a contract to indemnify …

[23] From the authorities aforesaid, it can be seen that there are many ways in which a right of indemnity may arise. As such, in our view, in order to maintain a claim for indemnity as in the present case, the respondent not only has to plead that the appellant was in breach of its contractual duty or its duty of care to him but also the cause or causes of action for such an indemnity, ie whether founded on an express or implied contract, or on an implied indemnity arising from the relationship between the parties.

[24] For the purpose of determining the nature of the respondent's claim herein, we find it necessary to have regard to the manner in which he pleaded his case. Before that, we paused to remind ourselves on the importance of pleading. In *Bullen & Leake & Jacob, Precedents of Pleadings* (15th Ed) 'pleadings' is described as a generic term to describe the formalised process by which a party states its case at a trial. One essential feature of pleadings is to state precisely the basic facts which give rise to a valid legal claim or defence so as to define the issues between the parties. It is also trite law that parties are bound by their own pleadings (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490 and *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65).

[25] In the instant appeal, the material part of the respondent's claim can be summarised as follows. It is not disputed that the appellant and the respondent have entered into a MOU for the development and operation of the club. The respondent asserted that he only agreed to participate in the project after being convinced by the appellant that they were experts in that area (see paras 3 and 4 of the statement of claim).

[26] The terms of the MOU are set out in para 4 of the statement of claim and are not disputed. It spelt out the duties and responsibilities of the appellant, which include the carrying out of feasibility study of the project, the appointment of technical consultants and negotiating for the acquisition of the site. The appellant was also responsible for the entire financial management of the project. Paragraph 5 of the statement of claim sets out in

detail the mode of execution of the project, including the signing of the share acquisition agreement under which the club was to purchase RDB's shares from Allied.

[27] Paragraph 6 of the statement of claim sets out the members objection over the share sale and the share acquisition agreement which culminated in the filing of the said suits for which the respondent was found to be liable (paras 7 and 8 of the statement of claim). The nub of respondent's case is pleaded in para 9 of the statement of claim where he asserted that his liabilities under the said suits were attributed to the appellant's breach of contract or duty of care owed to him. In para 10.1, the respondent asserted that by reason thereof he suffered loss and damages in terms of the judgment. The respondent prayed, inter alia, for an order to be fully indemnified by the appellant.

[28] From the respondent's statement of claim as summarised above, we agree with learned counsel for the appellant that neither an express or implied contract of indemnity, nor any other basis of indemnity, were pleaded as the basis for his claim for an indemnity. In our view, where a person *A* is claiming to be indemnified by *B* in respect of his liability to *C*, he must plead with clarity the basis of his entitlement to such an indemnity, ie whether it arises from any breach of contract, express or implied, or from any breach of duty of care, or otherwise to be implied from the nature of their relationship. It is not sufficient for him to merely include a prayer for an indemnity in the statement of claim without first stating the facts upon which such claim is founded.

[29] In the present appeal, we noted that none of the aforesaid elements was pleaded in the statement of claim to formulate or sustain a complete cause of action for an indemnity. Based on the pleadings, it is our finding that the respondent's claim herein is merely founded on a breach of contract and breach of duty of care in tort.

WHETHER THE RESPONDENT'S CLAIM IS TIME BARRED

[30] Next we turn to consider the issue of limitation. Learned counsel for the appellant pointed out that by virtue of s 6 of the Act, an action founded on contract or tort shall not be brought after the expiration of six years from the date in which the cause of action accrued. Relying on *Nasri v Mesah* [1971] 1 MLJ 32, he submitted that the cause of action founded on contract accrues on the date of its breach. As to an action founded on breach of duty of care in tort, learned counsel submitted that based on the authority of *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504, time begins to run from the commencement of such breach.

[31] Mr Jagdip Singh on the other hand contended that time does not run from the date the contract was breached but runs only from the date when the respondent's liability was ascertained by the court. In support, the court was referred to *R & H Green & Silly Weir Ltd v British Railways Board (Kavanaugh, third party)*, which was followed and adopted by the learned judge.

[32] The period of limitation prescribed by s 6 of the Act for an action founded on contract or tort is six years from the date on which the cause of action accrued. In the present appeal, it is apparent to us that it is the plaintiff's pleaded case that he had suffered damages in consequence of the defendant's breach of contract or alternatively breach of duty of care. The question is when did the damage happen.

[33] Having found that the plaintiff's statement of claim was framed as a breach of contract and breach of duty of care, then following *Nasri v Mesah* and *Ong Ah Bee v Hii Chung Siong, Robin*, the causes of action would date from the breach. In the present case, the alleged breaches as particularised in para 9.1 of the statement of claim relate to the advice given by the appellant to the respondent with regard to the setting up of the club, and the valuation of RDB shares in the share acquisition agreement, both of which must have taken place at the latest before 1983 when the members refused to pay the balance of the purchase price of the share sale. The present action which was only filed on 20 August 2003 was therefore statue-barred pursuant to s 6 of the Act. In our view, the learned judge had fallen into error in the computation of the limitation period when he failed to appreciate that the respondent's pleaded case herein was founded on breach of contract and tort and not on an indemnity.

[34] With regard to the filing of the unconditional appearance, we are unable to agree with learned counsel for the respondent that the appellant, having filed such an appearance has, abandoned its right to file the application under O 18 r 19 of the RHC. The said rule clearly provides that a striking out order may be made 'at any stage of the proceedings'. It must necessarily follow that neither the entry of an unconditional appearance, nor the serving of the statement of defence, precludes the appellant from making an application under the said rule. To hold otherwise would run counter to the express provisions of the said order (see *Chan Min Swee v Malawangi Sdn Bhd* [2000] 7 MLJ 111; [2000] 7 CLJ 1, *N Carrupaiya v MBf Property Services Sdn Bhd & Anor* [2001] MLJU 313; [2000] 4 MLJ 389, *Fu Yen Development Sdn Bhd (suing as a firm) v Shelley Yap Leong & Co (sued as a firm)* [2001] 3 AMR 3736, and *Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co (sued as a firm) & Ors* [2001] 6 MLJ 532; [2001] 3 AMR 3529).

[35] For the above reasons, we unanimously allowed the appeal with costs. The order of the High Court was set aside, and deposit paid into court was ordered to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kanesh Sundrum